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**OPERATIONAL REVIEW  
THE NEW HAMPSHIRE  
SUPREME COURT**

**March 2002**

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This report was developed under Technical Assistance Grant  
#T-01-006 from the State Justice Institute. The points of  
view expressed are those of the authors and do not necessarily  
represent the official position or policies of the  
State Justice Institute.

**Operational Review of the  
New Hampshire Supreme Court**

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## **INTRODUCTION**

Under State Justice Institute Grant of Technical Assistance #T-01-006, the National Center for State Courts (NCSC) proceeded with an operational review of the New Hampshire Supreme Court (Court<sup>1</sup>). A comprehensive site visit was conducted in April of 2001 by Penelope J. Wentland, Senior Court Management Consultant, and Susan Festag, contract consultant to NCSC and Chief Deputy Clerk of the Colorado Supreme Court. At the end of October, the consultants met with the Court to review and discuss preliminary observations and to proceed with finalization of the operational review. We wish to acknowledge in particular the cooperation and support of Chief Justice David A. Brock and that of all the Justices of this Court. Their active participation and interest has made this project possible and it is their openness and willingness to examine how the Court does its work that has provided the leadership necessary to accomplish a difficult task. Their example of candid and open communication flowed through to the staff of the Court as well, allowing NCSC to enter into meaningful dialog concerning the operations of the Court, its successes and failures, and the desire of the Justices and the staff to move forward to serve the citizens of New Hampshire and the ideals of justice.

One of the greatest challenges of this project has been to fully illustrate both where the Court has been in terms of its operations as well as articulate its on-going progress in the improvement of processes, management of caseload, and use of staff resources. A single snapshot of the Court at any one point in time does not reflect either its operational improvement or the energy and commitment of both Justices and staff to the Court's goals and mission. NCSC's involvement with the Court actually began during the Court's November 2000 retreat. That visit provided an opportunity to commence discussions with both Justices and staff, examining operations, identifying issues, and beginning the process of addressing and resolving structural deficiencies and

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<sup>1</sup> NCSC intends to use "Court" as a specific reference to the New Hampshire Supreme Court – both its Justices and its staff. Throughout this report, we discuss how other courts of last resort manage their business operations. In these examples, court will not be capitalized and will refer to any court – not the New Hampshire Supreme Court. In addition, the use of chief justice, justices, clerk, or staff attorney – when not capitalized – is intended to refer to any chief justice, justices, clerk, or staff attorney of any court – not the Chief Justice, Justices, Clerk, or Staff Attorneys of this Court.

inconsistencies. Prior to the review of this report and its publication, the New Hampshire Supreme Court announced and implemented numerous changes, addressing many of the issues raised in the course of this project. Some of our observations must now be considered historical and do not reflect the current status of the Court's operations. With each iteration of this report, we found ourselves documenting a situation, a process, or a procedure that had already changed – and changed to better support the mission and goals of the Court and its constituents.

### **Changing with the Changing Times**

There is no way that we can proceed with the operational review of the New Hampshire Supreme Court without acknowledging the recent events that have led, in part, to this review. Over the last two years, the New Hampshire Supreme Court has undergone a serious examination of its conduct, both internally and externally. The continued presence of Chief Justice Brock on the Court and his role and that of the other Justices in seeking and supporting this review is evidence of the strength of leadership and courage that can be built only through adversity, confrontation, and reflection. Chief Justice Brock's decision to move ahead for the good of the Court is an example for all. However, the Court, as an institution, is defined by far more than the individuals who comprise it at any particular point in time. The Court has a legacy and character of its own, influenced by its members – yes – but far more by the cumulative effect of its actions in clarifying, harmonizing, and developing the laws written by the state's citizens. NCSC is proud to be a part of the Court's history in conducting this review.

All courts must accommodate themselves to changes in their role as the forum for the resolution of disputes. The New Hampshire Supreme Court is no exception. Every court must contend with the need to provide professional management of its operations in addition to its management and performance of the adjudicative function. Historically, all courts have focused more on the adjudicative function rather than their administrative responsibilities. Yet any court must truly recognize its dual responsibilities and create a real response in fulfilling them. It is the management of operations that NCSC has examined – the how of doing the Court's business rather than the content of that business.

This report is not a scorecard as to how the Justices have performed in their work of judicial decision-making. We are not qualified to make that assessment. What it is, instead, is an examination of the Court's performance as a business unit whose business is to process cases, create and maintain records of its work, manage the staff doing the work, provide for an appropriate and organized work environment, and respond to its customers – attorneys and litigants.

In addition, states typically vest their courts of last resort with the responsibility for the administration of the state's justice system. With the court of last resort at the top of the hierarchy and its chief justice the first among equals, he or she ends up as the court system's chief executive officer as well. Today, no chief justice or associate justice has the luxury of only judging. Each must fill a myriad of administrative and management roles that have little to do with actual judicial decision-making. Many states have also created administrative offices for the court system, staffed with professional administrators, personnel specialists, information technologists, and budget analysts to assist the court of last resort in its management of the court system.

It is often overlooked in many states that the court of last resort is also an institution that requires administrative support. Historically, a court has depended upon its clerk to perform administrative tasks. Traditionally, justices have delegated these managerial tasks without providing either oversight or inquiry so that justices may focus on deciding cases. The New Hampshire Supreme Court is no different. In addition, like the justices, clerks of court are almost as likely to be lawyers as they are managers.<sup>2</sup> It is only recently that court administration has become a separate discipline and profession in and of itself for the very reason that those who are law-trained are not typically trained in the management of processes and the supervision of staff. But just as the delegation of tasks to an office of court administration does not relieve the court of last resort from its responsibilities as head of the state's justice system, the presence of the clerk of court in

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<sup>2</sup> *Appellate Court Procedures* indicates that currently seventeen (17) states and territories require that the clerk of the court of last resort have a law degree. C. Flango & D. Rottman, *Appellate Court Procedures* (Williamsburg, Va.: National Center for State Courts, 1998), Table 5.9 Number and Selection of Appellate Court Clerks, pp. 209-212.

the court of last resort does not replace the justices' need to manage the court. The chief justice remains the chief executive officer of the court as a business unit. The other justices may be compared to a board of directors or an executive leadership team. In addition to the work of judicial decision-making, the chief justice, along with his or her board or team, is responsible for the administration and management of the business supporting that judicial decision-making.

A court does differ from a business in that it is a public institution in a democratic system. The court belongs to the people just as the legislature does or executive branch agencies do. All three branches of government have faced the issue of building and retaining the public's trust and confidence in its institutions. One significant way to make public institutions accessible is to demystify their processes and procedures. A court should provide information concerning its administrative processes and assist its constituents in building appropriate expectations as to how long it takes a case to be processed, how a case is assigned to a justice in the majority for the rendering of the court's decision, and how that decision is processed for publication.

### **The Executive Leadership Team**

The New Hampshire Supreme Court had, like many courts and courts of last resort in particular, focused more on its judicial decision-making responsibilities rather than its role as administrator and manager of a business unit. This task was left to the Clerk. However, there was no specific definition of expectations or corresponding guidance as to how those expectations were to be met. The Clerk had focused on his preferred role as the outward face of the Court, interacting with attorneys and litigants, and assisting the public in understanding the purpose and work of the Court. These tasks, although necessary, appeared to take precedence over managing the business operations of the Court. At the direction of the court, a clerk should be the primary mover in implementing and maintaining an environment that supports judicial decision-making. In this Court, the Clerk had been left to implement and maintain an environment that was not fully articulated. While the Clerk was active in his role as the Court's public face, his lack of management of the Court's daily work or a corresponding lack of appropriate

delegation of some portion of that management to subordinates placed both the staff of the Court and the Justices in the position of working around the Clerk – rather than with and through the Clerk. As a single entity, the Court – Justices, Clerk, and staff –allowed this to occur. This was and remains a shared responsibility and requires a shared resolution. The Court has now provided a clear definition for the role of the Clerk.

The Clerk of Court, in addition to the Senior Staff Attorney, should be a key link between the Justices and the staff serving the Court. Without a dedicated presence working with the Justices to define policy and procedure and communicating those requirements to staff, the Court cannot efficiently perform its responsibilities. The Justices, too, have a role. They must take the necessary time from judicial decision-making to work with the Clerk to address those issues that impact the flow of work through the Court. What had happened, in this particular instance, is that the processing of cases became more complex and required a different type and span of attention and application of skills than it did even a decade ago. And yet the Court, including the Clerk, had functioned as if the situation had remained static. The turmoil of the Court's recent history contributed, in part, to this situation.

NCSC's only purpose in this operational review is to identify issues and offer potential solutions; it is not to assign either blame or responsibility in specific circumstances but to define those instances where the Court can perform its job more effectively and efficiently. We must also recognize the remarkable job done by the staff of this Court under extremely difficult and stressful circumstances. Their dedication and professionalism in serving the citizens of New Hampshire by ensuring that work continued in the Court, by their respectful conduct towards one another, the Justices, and attorneys and litigants, and by their commitment to the ideals of justice and the rule of law cannot be matched in any other court of last resort as no other court of last resort has faced what this Court has. The New Hampshire Bar Association has deservedly recognized this remarkable and graceful accomplishment with the presentation of a certificate of appreciation to the staff of the Supreme Court on June 22, 2001. The Chief



Justice, in accepting this certificate of appreciation on behalf of the Court's staff, acknowledged their "extraordinary fortitude and loyalty"<sup>3</sup>.

As the executive leadership team, the Justices, along with the Clerk and the Senior Staff Attorney, must define the Court's preferred method of operation and its goals, and construct plans and strategies that will take the Court where it wants to go. The inclusion of the Clerk and the Senior Staff Attorney brings the two primary components – administrative support and legal support – together with the Justices. Yet the Court had difficulty in assisting the Clerk to realize the need for a more participative and dynamic administration of the Court's operations. The Justices, in their eagerness to move forward, had been remiss in not fully including the Clerk. The Clerk, too, had difficulty in articulating the need for a redefinition of his role in the administration and management of the Court. This operational review presents an opportunity to correct this situation and it is with the full support of both the Justices and the Clerk that we make our recommendations for improvement of the Court's business processes.

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<sup>3</sup> From Chief Justice David A. Brock's acceptance speech on behalf of the staff of the Supreme Court, June 22, 2001, as reprinted in the New Hampshire Bar News – 7/6/2001 and accessed via their website at [www.nhbar.org](http://www.nhbar.org) on July 3, 2001.

## **ASSESSMENT**

The Court's work, other than that of deciding cases, divides into two primary areas – that of administering the support functions necessary for the case-deciding process and the mechanics of caseflow itself. The Clerk, as the de facto administrator of the Court and the reporter of its decisions, had a role in both. The Court has now clearly defined the role of the Clerk and refocused it to provide the necessary administrative support of the case-deciding process and facilitate the mechanics of caseflow.

### **Organization, Role Clarification, Performance Assessment, and Communication**

NCSC recommends that the Court address the basic structural issues of organization, role clarification, performance assessment, and communication before it begins the evaluation of its business processes for re-engineering. To reform how work is done can only be accomplished in an environment that is secure enough to accept change. Process re-engineering is first of all a documentation of how processes currently work, what resources they require and when, and the media used in their functioning. The Court must then be able to explore the ramifications of potential changes and Court staff must have the opportunity to participate fully in the re-engineering process. The reformulation of business process requires commitment, attention, resolve, and leadership. To attempt this within a fluctuating organization where roles are unclear and lines of authority blurred and in an environment where performance expectations have yet to be fully defined and lines of communication are either non-existent or faulty invites both frustration and failure.

*Organization.* The Court has already taken steps in re-examining the organizational structure of employees that support the work of the Court. In any court of last resort, there are at least two, more often, three, and sometimes, four types of legal staff available. The first resource is that of law clerks to support the work of individual justices. The second legal resource is that of central staff attorneys – assigned to the court rather than to individual justices and typically assisting in the processing of substantive issues within cases up to the point of decision. In addition, the clerk may be an attorney providing a third legal resource, assisting more often in processing procedural

matters that do not affect or impact the substance of a case. Not all courts of last resort require their clerks to be law-trained.<sup>4</sup> In these states, the courts of last resort have recognized the need for a professional manager and choose to utilize their other law-trained resources to assist in settling legal questions that come out of the clerk's office. These courts have also framed definitive policies to assist the clerk in processing procedural motions that move a case towards the point where it is ready for consideration and decision. Most often, these procedural matters concern initial extensions of time to file briefs or other ministerial (rather than judicial) functions. The fourth type of legal resource is that of counsel to the court or executive assistant to the chief justice. The Supreme Court of New Hampshire makes use of all these types of law-trained resources. NCSC emphasizes that there is no one combination of legal resources that works best. We have not found the one size that fits all.

All of the Court's legal resources, except for individual Justices' law clerks and the general counsel to the Court, were at one time under the Clerk. The realignment of the position of Senior Staff Attorney as well as the formation of other staff attorneys and paralegals into a central staff reporting directly to the Justices removed an unnecessary barrier between the Justices and the Senior Staff Attorney. Because the work of staff attorneys is directly concerned with the content of the case rather than the mechanics of case processing, it is appropriate that there exist direct lines of communication between the judicial decision-makers and central staff to facilitate the flow of that work. Placing the Clerk between the Justices and the Senior Staff Attorney provided a distraction for the Clerk from the management of case processing and decision reporting and unnecessarily mixed units having very different responsibilities.

By forming a central staff unit, the Court is now able to define what work staff attorneys should do and what work should continue to be done in the clerk's office. Too

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<sup>4</sup> States NOT requiring that a clerk of the court of last resort be law-trained include Alabama, Arkansas, California, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. Taken from C. Flango & D. Rottman, *Appellate Court Procedures* (Williamsburg, Va.: National Center for State Courts, 1998) Table 5.9, pp. 209-212.

often, during a reorganization of a unit or the restructuring of a business process, specific tasks follow specific people rather than conform to a unit's responsibilities and duties. Transitions, although difficult, must eventually occur. At some time following the integration of a new unit or the implementation of a re-engineered process (either three to six months or one or two business cycles such as an oral argument calendar), the Court should review the activities of the unit or outcomes of the re-engineered process to ensure that its goals have been clearly met. For example, should central staff personnel be responsible for making certified copies of records kept in the clerk's office? Who should prepare synopses of cases scheduled for oral argument? Are these synopses for the benefit of the Court or the press and the general public? Do they require writing by a staff attorney or only the supervision of a staff attorney? With the transfer of the LC2<sup>5</sup> process to central staff, has its essential nature changed and the value of the process to the Court diminished or been enhanced? What impact has the transfer of the LC2 process had on the workload of law clerks?<sup>6</sup>

Law clerks, although working for individual Justices, are also employees of the Court and should be kept routinely apprised of the same administrative matters as any other employee. This requirement goes beyond their orientation session. Because their jobs are both transitory and isolating in nature, they have a greater need for institutionalized communications and policy and procedure than do other employees who work in the Court for much longer periods and interact with other Court staff on a regular basis. Law clerks should be recognized and treated as full members of the Court's staff and have the same access to the Court's assets as other employees have; in particular, those research materials necessary for them to effectively do their jobs. They, like other employees of the Court, need a way to express suggestions, concerns, or frustrations in a positive manner that will assist the Court in recognizing and correcting problems,

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<sup>5</sup> The LC2 process is an in-depth review of a draft opinion's substance and style. Opinions go through many drafts and are reviewed by justices, law clerks, and staff attorneys many times before they are considered ready for circulation. The LC2 process represents a formalization of a final review before formal circulation of the opinion among the justices.

<sup>6</sup> NCSC learned during its October visit that the LC2 process is being fine-tuned to take best advantage of legal staff's time, training, and experience.

implementing improved work processes, and reducing the potential for conflict and dissatisfaction.

Prior to this Court's restructuring and re-assignment of personnel in October of 2001, not only the Clerk but also the Deputy Clerk was law-trained. The Court had available only three law-trained staff to assist it in its case processing responsibilities – the Clerk, the Deputy Clerk, and the Senior Staff Attorney. This, of course, did not include individual law clerks working for individual Justices. Law clerks are, by tradition and practice, assigned to specific chambers and are not available to the Court at large. By necessity, the Deputy Clerk had been very involved in the substantive context of case processing in addition to supporting the Clerk in his work as appellate court administrator and reporter of decisions. The Deputy Clerk had also developed specialized expertise in some types of cases coming before the Court and those cases flowed and continue to flow through him to take advantage of that expertise. In addition, the Deputy Clerk had been the first line of support to the staff in the clerk's office, the first reader of petitions filed with the Court, a quality assurance reviewer of opinions authored by the Justices, a final check on orders and opinions being released by the Court, and a proofreader of the Court's opinions prior to their inclusion in published volumes of decisions. The Deputy Clerk had also staffed the Judicial Conduct Committee making for a very full plate.<sup>7</sup> There is now no administrative support provided to the Judicial Conduct Committee by Court staff. The Deputy Clerk also played a key role in the process for the modification of court rules. In addition, the Deputy Clerk initiated some of the case management and issue tracking procedures used by the Court. The Deputy Clerk had performed many responsibilities typically reserved to a court's clerk. In other instances, some of the Deputy Clerk's tasks were clerical, as opposed to ministerial, in nature. These tasks do not require the same professional skills, qualifications, and judgment, as do other duties and responsibilities in the clerk's office.

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<sup>7</sup> According to the Court's May 7, 2001 news release, the Court has approved the creation of a committee to address matters of judicial conduct that is fully independent of the court system, subject to legislative funding.

*Role Clarification.* Management of personnel and procedure is necessary in any organization consisting of more than one individual. Where there is little or no management, staff will fill that void for many different and valid reasons. This study has provided the Court with an opportunity to clarify roles and expectations of the Clerk, Deputy Clerk, and Senior Staff Attorney. Clarification of duties and responsibilities for these key staff members will also assist other staff in the Court and define appropriate lines of communication, authority, responsibility, and delegation. NCSC recommends that the Court set clear lines of authority as to who reports to whom, that the organizational chart accurately reflect these lines of authority, and that supervisors be given both the responsibility for the work in their offices and the authority to make the needed changes to ensure that the work is done efficiently.

Prior to the initial review of this report and its publication, the New Hampshire Supreme Court announced and implemented changes in personnel and a redistribution of duties to address many of the concerns raised here. The realignment of specific staff into now separate and distinct positions reporting to the Justices permits the fuller involvement of the Court in its administrative and managerial activities as well as reduces the span of control for the staff involved. Having a separate Clerk of Court, Reporter of Decisions, Senior Staff Attorney, and General Counsel with each reporting directly to the Justices shortens the lines of communication for all. In addition, individual roles are clarified and better defined, allowing staff to assume full responsibility for their tasks and duties. The actual process of defining job responsibilities and job content increases and enhances accountability by ensuring that both staff and Justices are aware of requirements and expectations of performance. In addition, the role of the Deputy Clerk has been reoriented towards administrative case processing and staff supervision. Miscellaneous responsibilities requiring a law-trained individual have been reassigned to either the Clerk or Reporter of Decisions.

The *ABA Standards Relating to Appellate Courts* in Section 3.61 identify an appellate court administrator as a necessary component for smooth and efficient appellate court functioning. The appellate court administrator should participate in the development and implementation of administrative policy for the court, assist in calendar

management and conformance monitoring of caseflow time and clearance standards, provide general administration for all staff services, perform personnel, financial, and records administration, liaise with local governments or other entities as directed by the chief judge, provide facilities and equipment management and the purchase of outside services as necessary, serve as secretary for administrative meetings of the court's judges, provide reports to and consult with the administrative office of the courts, coordinate training and education for non-judicial personnel and assist with judicial education and training programs as needed, perform planning and research activities as required by the court, supervise shared administrative services, and manage the court's information system and other technology used by the court.<sup>8</sup> While this general listing of duties and responsibilities may not be completely appropriate for this Court, it is provided as a beginning point for the discussion of the Court's administrative requirements.

In addition to the law-trained Deputy Clerk supporting the Clerk, the Court had a second Deputy Clerk responsible for the supervision of staff in the clerk's office and the orderly flow of paper from this office to the Justices. Day-to-day processing of the Court's work in, through, and out of the clerk's office had been hampered by the Clerk's attention to the Court's public interface and the lack of clear delegation of responsibilities as well as the blurring of duties between both Deputy Clerks and the Clerk. This has since been addressed through the reassignment of personnel and redistribution of functions among available staff. NCSC believes that a clear statement of duties and responsibilities for all of the Court's staff as well as expectations for their performance by the Court enhances the basic functioning of the Court. This definition should occur not only within the context of the Court's requirements but in accordance with personnel policies and procedures already established throughout the court system by the Court through the Administrative Office of the Courts.

The Court should also clarify what role the Administrative Office of the Courts (AOC) can assume to support the administration of the Court. The Court clearly utilizes the technology resources available through the AOC and will be working even more

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<sup>8</sup> American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts 1994 Edition*, American Bar Association, Chicago (1995) pp. 117-118.

closely with them as the AOC assists the Court in defining and implementing a case management system. However, the AOC also has on staff personnel specialists who can assist the Court in the writing of job descriptions, the defining, implementation, and administration of a performance assessment system, and in formulating personnel policies that frame each individual's employment with the Court. The AOC may also be able to assist the Court in staffing various commissions or in the administration of the bar exam and admissions to the bar.<sup>9</sup>

*Performance Assessment.* Clearly, each member of the Court's non-judicial staff should be certain of what his or her job responsibilities are, know how he or she should perform those responsibilities, and have the opportunity for a full and frank discussion of performance with a supervisor or manager on a periodic basis. For the Clerk and Senior Staff Attorney, evaluation of performance must be a responsibility of the Justices as it is to the Justices that the Clerk and Senior Staff Attorney are directly responsible. Like every other member of the Court's staff, the Clerk and Senior Staff Attorney deserve the same considerations in knowing what is expected of them as they perform their duties. Just as the Court has adopted standards by which to gauge its own performance in hearing and deciding cases, this atmosphere of assessment must be extended throughout the Court. The Justices are willing to be evaluated by the constituencies they serve, as should the Clerk and Senior Staff Attorney and every other employee of the Court. Without this type of appraisal based on clearly articulated expectations, no employee has the opportunity to perform his or her job to the best of his or her abilities.

*Internal Communications.* The Court has clearly moved ahead in its resolve to implement solutions to address some of the criticisms it has faced. The Court has also been eager to implement processes and procedures to correct problems and issues identified and discussed with the Court during our visits in October of 2000 and April of 2001. The pace of change has been exhilarating and has, in fact, outpaced our production of this report in several instances. It has also sometimes been disorienting and confusing for the Court's staff. As the Court organizes for performance, publishes roles, duties, and

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<sup>9</sup> NCSC did not have an opportunity to meet with Court staff supporting bar exam and admission activities. We do not know if support is either needed or already provided by the AOC at this time.



responsibilities for its staff, and identifies lines and methods of communication and then uses them, what has sometimes been characterized as disorienting and confusing will then be recognized as appropriate and necessary and smoothly implemented. It is also important for the Justices in their eagerness to define policy and procedure to remember that it is both beneficial and necessary to have the input of those who will actually make the policies and procedures a reality. Consulting with staff involved in the day-to-day activities of the Court can provide insight into the history of particular functions and their benefits and drawbacks.

Many of the problem issues reported by Court staff resulted from a lack of definition and refinement of business processes. Many of these issues represented frustration over the failure to resolve relatively minor work annoyances. They have included such things as the use of a printed recusal list sorted by Justice rather than an automated word processing table that may be sorted by either Justice or the party or firm that is the cause of the recusal. The confidential clerk routinely copied and distributed opinions outside the Court – opinions already available via the Internet. The same was true for synopses of the cases scheduled for oral argument. Opinions must be formatted in the Court’s announcement format as well as that of the official publisher. By providing the Court’s publisher with an electronic copy, he is then free to make whatever formatting changes deemed necessary.<sup>10</sup> These issues have been frustrating because solutions are relatively simple, but there was no route or method to bring them to the attention of someone who could resolve them. In addition, the Court needs to develop a quick and easy way to communicate administrative information such as early closures for snow days, training schedules, adjustments to court calendars, etc. Working with AOC information technologists, the Court could define various group e-mail addresses comprised of clerks, law clerks, staff attorneys, court administrative personnel, or simply the Court. These problems illustrate how the lack of strong and attentive management affects how people work as well as their attitudes toward work and thus the impact on the

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<sup>10</sup> Reviewing the galley of an opinion prior to its publication is a responsibility of the Reporter of Decisions today. The Court should encourage the publisher to perform his own clerical functions.

workflow of the Court. The Court should require that periodic staff meetings be held so that these types of issues can be identified, discussed, and addressed.

*External Communications.* In addition to enhanced communication with Court staff, the Court also needs to keep its other constituencies apprised of changes in process and procedure that will impact their business with the Court. NCSC had the opportunity to meet with a representative group of attorneys who practice before the Court and their comments on the Court's operations were insightful and thoughtful. There is a strong desire on the part of these attorneys to participate in the Court's efforts to resolve its backlog and reduce time on appeal. The Court, through its adoption of judicial performance standards, has initiated and opened lines of communication. NCSC hopes that the Court and the members of the New Hampshire Bar can positively build on this promising beginning. The Court has also expanded its opportunities for communication through the hiring of a Court Information Officer. This key position not only serves as a channel to distribute information about the Court and its activities, but can also assist the Court in educating the public concerning the appellate process. The addition of this position also provides some relief to the Clerk as the Court Information Officer can now provide general information and orientation to the Court for visiting groups or organizations requesting a generalist speaker from the Court.

To underline the necessity of open and frequent communication, in discussions with staff during our April 2001 visit, some staff members were unaware what dates had been set aside in May for the clerk's agenda or the Court Conference while Justices indicated that those Court meetings had been scheduled. In our meeting with attorneys, several mentioned the problems associated with not knowing which week of the month oral arguments are to be held, particularly in light of the Court's desire to hold to a strict "no continuances" policy. Others reported misunderstanding how the Court operates and would like more guidance as to what factors the Court considers when it decides whether or not to take a case. They also expressed general frustration as to why there was a significant time delay between the date that the Court made a decision and the date that

the clerk's office issued the order informing the parties of the Court's decision.<sup>11</sup> All of these examples are readily solvable – as evidenced by the Court immediately addressing the causes for delay in the issuance of orders to parties. But there must be an institutional mechanism to facilitate communication between the Court and its constituencies.

One of NCSC's recommendations to enhance relationships with the bar, the Court has anticipated.<sup>12</sup> We believe that the Court should initiate a series of articles focusing on the Court's internal rules and operating procedures, the types of issues that the Court considers when it decides whether to accept or decline a case, docket innovations such as the 3JX docket and attorney reaction to it, and other issues currently facing the Court. This should broaden the perspective as to how the Court's internal procedures affect workflow and remove some of the mystery concerning its operations. The Court may wish to follow the example of the Wisconsin Supreme Court in publishing its internal operating procedures.<sup>13</sup>

The Court should also consider publishing a calendar of its dates for oral argument, Court Conference, and clerk's agenda and include key dates such as bar or judicial conferences. However, in order to publish a calendar, the Court must set a calendar. In many courts, key dates for the court are set and published a year in advance.

### **Strategic Planning and Setting Standards**

If you don't know where you are going, how will you know when you get there? No institution can escape the need for articulating goals and devising plans to achieve them. Not even a court. Not even a court of last resort. Filings and dispositions in the New Hampshire Supreme Court from 1990 – 1999 were:<sup>14</sup>

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<sup>11</sup> The Court has informed NCSC that it has taken action to resolve the delay between the order and its issuance.

<sup>12</sup> Hon. Joseph P Nadeau, *The Supreme Court Looks Ahead*, accessed on the New Hampshire Bar Association Online on July 3, 2001.

<sup>13</sup> The Wisconsin Supreme Court's *Internal Operating Procedures* may be found at [www.courts.state.wi.us/supreme/sc\\_iop.asp](http://www.courts.state.wi.us/supreme/sc_iop.asp).

<sup>14</sup> This table is reproduced from the Court Statistics Project, *State Court Caseload Statistics, 1999-2000* (Williamsburg, Va.: National Center for State Courts 2000), Table 14: Discretionary Petitions In State Appellate Courts, 1990-1999, p.186.

<b>YEAR</b>	<b>FILINGS</b>	<b>DISPOSITIONS</b>
<b>1990</b>	<b>627</b>	<b>567</b>
<b>1991</b>	<b>597</b>	<b>543</b>
<b>1992</b>	<b>774</b>	<b>515</b>
<b>1993</b>	<b>864</b>	<b>662</b>
<b>1994</b>	<b>880</b>	<b>793</b>
<b>1995</b>	<b>892</b>	<b>875</b>
<b>1996</b>	<b>850</b>	<b>857</b>
<b>1997</b>	<b>915</b>	<b>907</b>
<b>1998</b>	<b>839</b>	<b>767</b>
<b>1999</b>	<b>826</b>	<b>826</b>

By 1999 filings had increased 31% since 1990 and dispositions by 46% although 1997 represented something of a peak with filings having increased by 46% and dispositions by 60%. Given the experience of the past, the Court now needs to be proactive in planning its future. NCSC recommends that the Court through its Executive Leadership Team devise a strategic plan. In formulating a strategic plan, the Court should offer its draft to both the trial court bench and bar for comment. Their input can assist the Court in gaining the support necessary to accomplish its goals. We recommend that the Court ground its planning effort in the Appellate Court Performance Standards. Developed with a grant from the State Justice Institute, grant number SJI-93-091-B-261, under the direction of Roger A. Hanson and published by the National Center for State Courts in 1995, these standards identify four performance areas, Protecting the Rule of Law, Promoting the Rule of Law, Preserving the Public Trust, and Using Public Resources Efficiently. Within these four performance areas, fifteen standards have been identified and can be used by the Court to create a strategic plan by allowing the Court to articulate its interests, identify goals, and plan the implementation of mandates within a recognized framework for discussion. Of particular interest, these standards attempt to describe the realities of an appellate court system within the context of the state

governmental process.<sup>15</sup> NCSC also published in 1999 guideposts<sup>16</sup> based on the Appellate Court Performance Standards. These guideposts can provide to the Court tangible criteria for the assessment of its performance. The *ABA Standards Relating to Appellate Courts*, although focused on the internal operations of an appellate court, is also an excellent reference to inform a strategic planning process. In this area, the Court has, once again, anticipated the NCSC recommendation through its adoption of time standards for the movement of cases through the appellate process. The Court's July 2, 2001 news release indicates that the Court has adopted a standard of 180 days for setting a case on the oral argument calendar and 180 days for the issuance of the Court's opinion upon completion of the oral argument. NCSC recommends that the Court carefully monitor these standards looking towards the future and the feasibility of adopting the ABA Reference Model and its time standard for courts of last resort as presented in Section 3.52 (c) of the *ABA Standards Relating to Appellate Courts*.<sup>17</sup>

### **The Facility Itself**

The appellate court administrator is responsible for "Facilities and equipment management and the purchase of outside services as required".<sup>18</sup> Court staff not only need information on policies and procedures to do their work most effectively, they also need facilities and a workspace that enhances rather than hinders them in performing their duties and fulfilling their responsibilities.

During our visit to the Court we noticed that the court assistant often had to stop entering data in order to obtain information from a hard-copy directory. There is not enough room on the desk for both new cases waiting to be entered and the reference material that she uses. The lack of available workspace and proper storage for cases

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<sup>15</sup> Roger A. Hanson, Project Director, *Appellate Court Performance Standards*, (Williamsburg, Va.: National Center for State Courts 1995) p. iii.

<sup>16</sup> Roger A. Hanson, Project Director, *Appellate Court Performance Standards and Measures*, (Williamsburg, Va.: National Center for State Courts 1999).

<sup>17</sup> This standard indicates that 50% of all cases should be resolved within 290 days from the filing of the notice of appeal and that 90% of all cases should be resolved within one year from the filing of the notice of appeal.

<sup>18</sup> American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts*, American Bar Association, Chicago, Illinois, 1994, p. 118.

awaiting data entry and initialization in the docket card system combined to force this employee to work in an inefficient manner.

Because cases cannot be appropriately stored during their initial work-up, not only the case but also any attached check was left in plain view on the court assistant's desk. The clerk's office manual of procedures states that if cash is received, a receipt must be made out. It states where the receipt is to be filed, but does not indicate what happens to the cash. Both cash and checks should be immediately placed in a cash register or other secure location. Wherever that location is, it does not appear convenient for the court assistant to access. Distribution boxes for Court staff are located immediately next to what is an already inadequate front counter thereby increasing congestion at the Court's primary point of contact with attorneys and litigants.

NCSC recommends that a facilities renovation plan be designed and implemented with the twin goals of improving the business flow through the clerk's office and enabling clerk's office personnel to work more efficiently. It is critical that this plan be designed with the input of employees assigned to the clerk's office. Recognizing that space in the clerk's office is severely limited, adding a proper counter with room to work and a secure area for cash and checks should be made a priority.<sup>19</sup> In addition, the clerk's office should be redesigned so as to minimize traffic in the work area near the counter. Distribution boxes for Court staff should be moved away from the front counter area. In addition to reorganizing the clerk's office counter area, all of the employees working in the clerk's office need more actual physical space. Each work area should be evaluated to determine if it is making the most effective and efficient use of the available space. Each workstation should be ergonomically designed to accommodate use of a computer, include an area for storing both pending and completed work, and provide appropriate storage for reference materials.

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<sup>19</sup> NCSC noticed the spacious expanse of the passageway from the building lobby to the front counter of the clerk's office.

## Caseflow Mechanics

The appellate court administrator is responsible for “Calendar management and conformance monitoring of caseflow time and clearance standards”.<sup>20</sup> It is within the role of the appellate court administrator to assist the court in developing business procedures that help the court control the flow of its caseload in the most efficient manner possible. The perception of how well a court is fulfilling its responsibilities is based on both the merits of its legal decisions and how cases are processed through the court. This Court has suffered from both the perception and the reality that there was delay at every step of the process. There are two specific areas where delay has been most dramatic. These are the setting of cases for oral argument and the mechanics of issuing an order once the Court has reached a decision.

*Setting Cases for Oral Argument.* There is general agreement that the biggest delay facing the Court was the time between filing of the appeal and the time that a case was actually set for oral argument. This process used to take approximately eighteen months. There remains some variance in this timeframe because cases are set based on the original filing date, not based on when briefing is actually completed. Thus, a case filed in 1999 would have an earlier oral argument date than a case filed in 2000 even if the briefing was completed more quickly in the 2000 case. NCSC recommends that cases be set for oral argument as soon as briefs are completed irrespective of the case’s filing date. While this may result in a disruption of the first-in first-out pattern of caseflow, no case where a timely and responsive briefing schedule was followed will wait for another case simply because that other case had been filed earlier yet attorneys requested extensions for the filing of briefs or used the maximum allotted time to prepare briefs and took longer to progress through the briefing stage.

*Addressing Backlog.* To reduce the backlog of cases awaiting oral argument, the Court instituted what was originally called the “Second Thursday Docket”. The five Justices are randomly assigned to sit in panels of three, rather than *en banc* as is done on

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<sup>20</sup> American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts*, American Bar Association, Chicago, Illinois, 1994, p. 118.

the regular docket. The first “Second Thursday Docket” was held on December 14, 2000. It was designed to provide a quicker resolution for cases that did not require a fully reasoned opinion. While the opinions are short, they must reflect a unanimous decision. Since its implementation, it has been renamed the 3JX docket. This docket provides the Court with a fast track option for appropriate cases. The Clerk reported that cases screened in December 2000 were set for the May 2001 3JX docket. This represents a dramatic reduction over the eighteen-month delay in getting an oral argument date on the regular docket.

At its inception, cases that had already been accepted by the Court were scheduled on the 3JX docket at the recommendation of the Clerk. Orders arising from the 3JX dockets are issued in a timely manner and are distributed prior to the next scheduled 3JX docket. Currently the Justices decide if a case is a candidate for the 3JX docket at the time that it decides to accept a case. The Clerk may add cases to the 3JX docket. Cases may also be added at the request of parties. Attorneys may file a motion objecting to the assignment of a particular case to the 3JX docket. They may also request reargument before the full Court following a decision out of the 3JX docket.

The creation of the 3JX docket has been beneficial to the Court, but it has not been without controversy. First, there is some disagreement over whether the purpose of the docket is to take more cases, to correct lower court errors, or to expedite the backlog. The second area of controversy is that cases heard on the 3JX docket do not have either precedential or persuasive value. NCSC believes that a clear and public announcement of criteria for assigning cases to the 3JX docket will assist in resolving these controversies. We believe that the Court’s intention in not permitting 3JX decisions to be cited as precedent or used persuasively is to prevent the *sub rosa* development of an intermediate appellate court within the court of last resort. NCSC agrees that an accelerated review and decision process cannot replace an intermediate appellate court should one be required. However, the 3JX docket can be extremely beneficial in assisting the Court in addressing issues of backlog and delay for cases that, while requiring the attention of the court of last resort, do not add to the body of law. Should there be disagreement over this in any particular instance, the Court has provided a process for requesting reargument.



NCSC also recommends that the Court gather more specific information that can support informed decision-making concerning its backlog and time on appeal. This includes case number, case type, any oral argument options (regular docket, 3JX docket, submission on briefs) and priority, briefing completion date, and Justice recusals. The Court then needs to collect information on the status of its outstanding cases as a whole. It needs to know how many cases are awaiting oral argument and how long they have been waiting. It also needs to know the number of cases currently in briefing that will soon be added to the list of cases awaiting oral argument. The Court can then adjust oral argument dates by adding more regular docket days or 3JX docket days as needed based on the composition of the pending caseload. To cut the current backlog, the Court must ensure that 3JX docket days are in addition to regular docket days and not simply a substitution for some of the regular docket days, that cases are appropriately assigned to the 3JX docket, and that cases that may be appropriate for submission on the briefs are noted. Reports should be generated detailing the amount of time it takes a case to be assigned to the regular docket, to the 3JX docket, or to be submitted on briefs. These reports should be available to both the Court and the bar.

These monitoring techniques and reports can be quite difficult to perform and produce without an automated case management and information system. Until January of 2002, the Court creatively used word processing to perform case-management-like functions (generation of a docket card using a word processing template, creation of an electronic case file folder for electronic copies of notices and other notations and correspondence, generation of labels for hard-copy case file folders, merging of docket card data with correspondence, notice, and order templates, etc.) in the absence of an automated case management system. However, the Court did not have the necessary data, compiled and aggregated, and the exception reporting needed to adequately manage its flow of cases. The Court, with funds recently appropriated by the legislature, has now implemented a case management system to respond to these very concerns.

*Motions and Orders.* Staff attorneys handle motions from initial case screening until a case is completed and jurisdiction is returned to the trial court. Simple motions and orders such as extensions of time or the issuance of a briefing schedule are prepared

by the clerk's office and signed by a single Justice. Staff attorneys handle more complex motions because they require either the drafting of an order or the preparation of a full memorandum concerning the issues in the motion before the Court is able to take action.

There was a serious backlog in the issuance of decisions on motions at the time of the NCSC April 2001 site visit. It was reported that there could be a two- or three-month delay between the date that the Court made the decision and the date that the order was actually mailed to the parties. The Court has now addressed this issue and orders are being issued within a week to ten days from the date of decision. NCSC considers this to be a laudable interim goal that is adequate for minor procedural orders but we do not believe that it is appropriate for key orders concerning the status of the case. For example, issuing orders accepting a case should be made a priority and should be issued within two days of the Court's decision. The Court should continue to monitor its order issuance process to ensure that it is responsive to the needs of the litigants and reflective of the Court's performance in both decision-making and promulgating those decisions.

*Statistics.* As a case management system has only recently been installed, the Court had been very creative in its use of word processing templates and PC operating system functionality for organizing electronically stored data to produce a docket card. Using a web-based system, all Court staff could view court documents and docket cards. The Court also used Excel to reflect the movement of cases through the appellate process. While not a true case management system, it fulfilled many of the Court's needs. A true case management system will make for more efficient collection of statistics. The only way for any court to know if it is meeting objective standards is to collect the specific data necessary to document its performance and analyze that data in order to draw conclusions and apply them to processes and procedures. What might be an acceptable timeframe for the issuance of an opinion in a civil appeal may be very different from what would be acceptable in a criminal interlocutory appeal.

This data should include a breakdown of filings and dispositions by case type in addition to delineating disposition type. In order to accurately determine time on appeal, the Court should monitor the following key steps:

- Elapsed time from filing of notice of appeal to acceptance or declination
- Elapsed time from acceptance of appeal to receipt of the record
- Conformance to court rules and briefing schedules
- Elapsed time from completion of briefing to setting for oral argument
- Elapsed time from oral argument to circulation of the draft opinion
- Elapsed time from circulation to issuance of final opinion

With this information the Court can monitor its own performance as well as adherence by trial courts and attorneys with court rules.

NCSC offers this report to the Court for its debate and consideration. We also hope that this report will assist the non-Court reader in understanding how the New Hampshire Supreme Court functions. The Court has made tremendous strides in the last year in reorganizing itself into an institution ready for the 21<sup>st</sup> century that is firmly anchored in and building upon its history, tradition, and accumulated wisdom. We are grateful to have been a part of this process.

## **SUMMARY OF RECOMMENDATIONS**

This summary of recommendations is not intended to replace the presentation of observations and recommendations found throughout the report. For a full discussion, please review those pages referenced in parentheses.

1. NCSC recommends that the Court provide for closer and tighter administration of the Court's business processes. (p. 5.)
2. NCSC recommends that the Court re-examine its organizational structure in order provide for the logical and coherent flow of cases. (pp. 7, 9.)
3. NCSC recommends that the Court restructure its legal resources (law-trained staff) to ensure maximum staff utilization and clear role definition and delineation. (pp. 8, 10.)
4. NCSC recommends that the Court ensure that law clerks are included in administrative communications affecting their working environment and that appropriate policy and procedure directives be developed to fully integrate law clerks into the life of the Court. (p. 9.)
5. NCSC recommends that the Court establish clear lines of authority for its staff, publish and circulate an organizational chart reflecting those lines, and empower supervisors with the necessary authority to fulfill their responsibilities. (p. 11.)
6. NCSC recommends that the Court fully define those areas of interaction with and support from the Administrative Office of the Courts. (p. 12.)
7. NCSC recommends that the Court establish a performance assessment system to enable both the Court and its employees to define appropriate expectations of job performance and permit the measurement of performance against objective job-related goals. (p. 13.)
8. NCSC recommends that the Court establish formal lines of communication for the dissemination and adoption of policy and procedural changes. (pp. 13, 15.)
9. NCSC recommends that the Court solicit input from Court staff concerning procedural modifications that impact the workflow of cases through the Court. (p. 13.)
10. NCSC recommends that the Court create a standing business process re-engineering team consisting of a Justice and appropriate Court staff to review and evaluate the Court's business processes for possible re-engineering. (p. 14.)
11. NCSC recommends that the Court hold periodic staff meetings to ensure that information is clearly communicated and fully understood and that opportunities for input, comment, and observation are available. (p. 14.)

12. NCSC recommends that the Court set both the 3JX and Oral Argument calendars for a year at a time and publish those calendars via its website and through the New Hampshire Bar Association. NCSC recommends that the Court set the dates for the Clerk's Agenda a year at a time and publish those dates internally to the Court and Court staff. (p. 16.)
13. NCSC recommends that the Court disseminate information concerning its business processes and internal procedures to the New Hampshire Bar Association and the general public. (p. 16.)
14. NCSC recommends that the Court undertake a strategic planning effort and institute processes and procedures to undertake an annual review and update of the Court's strategic plan. (p. 18.)
15. NCSC recommends that the Court ground its strategic planning process in the Appellate Court Performance Standards. (p. 17.)
16. NCSC recommends that the Court adopt as one of its strategic goals implementation of the ABA Reference Model time standard for cases in a court of last resort. (p. 18.)
17. NCSC recommends that the Court review its use of the Supreme Court facility to ensure that its business processes are appropriately and adequately housed and that the facility itself supports appropriate workflow. (p. 19.)
18. NCSC recommends that the Court set cases for oral argument upon completion of briefing rather than by date of filing upon completion of briefing. (p. 20.)
19. NCSC recommends that the Court publish its criteria for the assignment of cases to the 3JX docket. (p. 22.)
20. NCSC recommends that the Court expand the data collected about its caseload in order to provide it with accurate and timely information concerning cases before the Court. (pp. 22, 24, 25.)
21. NCSC recommends that the Court assign cases for consideration and decision based upon the date that briefing is complete rather than the date of filing. (p. 21.)
22. NCSC recommends that the Court adopt a goal of two days between the Court's acceptance of a case and issuance of the order notifying parties. (p. 24.)

## **APPENDIX A**

## Workflow Narrative for the New Hampshire Supreme Court November 2001

### Case Types

Rule 4 of the Rules of Supreme Court of New Hampshire lists the types of cases over which the New Hampshire Supreme Court has jurisdiction. These case types include: Appeal from Lower Court Decision on the Merits, Interlocutory Appeal, Interlocutory Transfer, Appeal from Administrative Agency, Petition for Original Jurisdiction, and Request for Advisory Opinion.<sup>1</sup> For purposes of this workflow narrative, the term “appeal” will be used for simplicity regardless of the actual case type.

### Case Docketing

When the Court receives an appeal, it is date stamped upon receipt. It is then reviewed for timeliness. If the pleading is late, a motion for late entry must accompany it. The Clerk's Office will issue a procedural order if a motion does not accompany a late filing. Next the pleading is reviewed (1) to ensure that it is in the proper format, (2) that the required documents are attached, and (3) that the correct number of copies has been submitted. If the appeal is not filed in the proper form, the filing party will be notified and directed to correct it and refile. If a filing fee is required, either the filing fee or a Motion for Waiver of Filing Fee must accompany the appeal.

Once an appeal is timely filed in the proper format, it is given to a court assistant for docketing. It is assigned a case number (also referred to as a docket number) and the original document is filed in the hard copy case folder. An electronic folder, docket card, and order shell for the case are created using specialized functionality<sup>2</sup> created for the Clerk's Office by the AOC. A priority is placed on entering at a minimum, the case number and the case name so they are searchable. All other information from the appeal that must be entered in the computer can be added at a later date.

The court assistant checks the disqualification list when he/she enters data from the notice of appeal into the computer. If there is a potential disqualification, the court assistant adds a comment to the electronic docket card. During the screening process, the Justice will make a final determination as to disqualification. Once the final determination is made, any disqualification will be noted on the *Master Screening Check Sheet*. A staff attorney will enter the actual disqualification on the electronic docket card.

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<sup>1</sup> The Court also has jurisdiction over attorney discipline cases. This type of case is not included in this workflow narrative.

<sup>2</sup> This functionality is not actually an application but utilizes both the features of MICROSOFT Word and Windows to automate the generation of the electronic document folder, docket card, and order shell.

The docket file is sent to the Deputy Clerk for proofreading. The Deputy Clerk also initializes the case on the *Tracking Spreadsheet* (created in MICROSOFT Excel). The *Tracking Spreadsheet* contains basic information about the case such as case number, filing date, case name, case type, and the dates of key events pertaining to the cases. The *Tracking Spreadsheet* is used for general case tracking. A copy of the notice of appeal is sent to the Reporter of Decisions (Reporter) for procedural and legal screening. If the court assistant has any questions about timeliness or other issues concerning the appeal, a note is placed on the document to call this matter to the Reporter's attention. A second copy goes to the secretary/receptionist who issues a letter informing the parties of the filing and the case number assignment. A third copy goes to the paralegal so he/she may create a shell for the electronic case index and update information other than legal issues in the case index. If there is a question concerning confidentiality, the paralegal's copy will be flagged. This assists in the preparation of draft orders regarding confidentiality and, if approved, their issuance.

### Case Screening

When the Reporter receives the appeal, he/she enters the case issues on the electronic case index. This case index includes, in addition to basic case information, a searchable summary of case issues.

New cases are held for thirty days to allow time for a cross-appeal, a response, or a Motion for Summary Disposition and response to be filed. After this time has passed, the case is ready to be sent to the Justices for screening. The Reporter checks the electronic docket card to ensure that he/she has all the pleadings that have been filed and also checks the disqualification list. He/She reviews jurisdictional issues and verifies that the pleading is procedurally correct. He/She marks juvenile and domestic violence cases for confidential handling and identifies cases requiring expedited processing (*Expedited Cases List*).

A screening summary sheet called a *Screening Check Sheet* is prepared for each case. The pleadings are attached to the *Screening Check Sheet*. The Reporter makes one original set for each case and then sends them to the Clerk's Office to make additional sets for distribution to the Justices. Screening packets are prepared weekly.

The Reporter also prepares a *Master Screening Check Sheet*. This is an electronic document that shows when cases are set for screening. Two printouts are made of this document with one going to the Chief Justice and one going to the junior Associate Justice.

An entry is also made on the Court's *Tracking Spreadsheet* to add the screening date.



### Clerk's Agenda

The Clerk's Agenda is basically a combined motions and administrative conference. A variety of matters are handled through the Clerk's Agenda. The Clerk, Deputy Clerk, Reporter, Senior Staff Attorney or General Counsel may add matters to the Clerk's Agenda. Copies of the agenda and relevant pleadings are distributed to the Court at least two days prior to the conference.

### Screening Conference

While a limited number of cases may be screened at Clerk's Agenda, the majority of the screening is handled at the screening conference. Screening conferences are held every other week. The Justices review the cases and may immediately issue either an acceptance order or a declination of acceptance order. Cases are accepted on the recommendation of one Justice. The Court may also decide to schedule a prehearing evaluation conference. Either party can also request that a prehearing evaluation conference be held.

### Acceptance/Declination of Acceptance Orders

If no Justice wants to accept a case, a declination of acceptance order is issued. The order is drafted by the Senior Staff Attorney who then gives the draft to the paralegals for finalization and mailing. An entry is made on the electronic docket card and the electronic document of the order that is issued is hyperlinked to the electronic docket card. The electronic docket card shows only the date that the clerk prepared the order for mailing. The order contains both the date the Court made the decision and the date that the paralegal finalized and mailed the order.

If at least one Justice wants to accept a case, an acceptance order is issued. The procedural steps involved in issuing an acceptance order are the same as in a declination of acceptance, but an acceptance order will include language concerning ordering a transcript, specifying or limiting the questions that the Court will consider, and stating whether or not the case is appropriate for the 3JX docket.

The secretary/receptionist drafts a *Cases Accepted List*. This list is reviewed by the Senior Staff Attorney prior to distribution to the New Hampshire Bar News and to key personnel within the Court.

### Record

The record may consist of the trial court case file, transcripts of proceedings, exhibits from the trial court, or a certified copy of the record from an agency or board. A record is not filed unless a case has been accepted and an acceptance order has been issued. A payment order is also issued directing that the estimated cost of preparing the transcript be paid to the clerk of the trial court. Once this payment is made, the trial court clerk notifies the court

reporter to prepare the transcript. A copy of the notice is then filed with the Supreme Court. The transcript is generally due sixty (60) days from the date on the payment order. A court assistant will post the case to the *Transcripts Pending List*. Once the transcript is filed, that fact is noted on the electronic docket card and a briefing schedule is issued,

### Briefs

Once the record is received, a briefing schedule is issued. The due dates for the briefs are based on the length of the transcript. Specific dates for both the Opening Brief and the Opposing Brief are listed in the briefing schedule. When briefs are filed, they are reviewed for timeliness and proper format. Rules 16 and 17 of the Rules of Supreme Court of New Hampshire govern briefs and appendices. Once a case is fully briefed, it is added to the *All-Briefed List*.

### Oral Argument Assignments

The *All-Briefed List* is used to select cases for oral argument and to prepare a list of cases for submission without oral argument. The *Expedited Cases List* is also reviewed prior to making these selections. If a case is not expedited and is to be orally argued, it is assigned a date with the earliest filed cases first.

Cases can be assigned to either the 3JX docket or the regular docket for oral argument. Currently cases on the 3JX docket can be heard within six months of the time that they are accepted. It currently takes between twelve and eighteen months from the time of filing for a case to be heard on the regular oral argument calendar.

Once cases are selected for oral argument, the Deputy Clerk prepares a draft oral argument schedule for the Clerk to review. Once finalized, the oral argument schedule is mailed to the attorneys for the selected cases. The oral argument schedule is issued approximately one month before the oral argument date.

The court assistant drafts a synopsis of each case set for oral argument. These drafts are based on the summary of issues in the case index. These drafts are reviewed and finalized by the paralegals. Currently 50 to 55 copies of these synopses are made for distribution.<sup>3</sup> In addition, the synopses are copied to a specific directory on the Court's network so that the AOC's IT staff may post them on the Internet. These synopses are generally posted one week before oral argument.

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<sup>3</sup> See page 125 of the State of New Hampshire Supreme Court Clerk's Office Manual of Procedures for a full distribution list

### Bench Memos/Oral Argument Preparation

In March 2001 the Court began an experimental process of preassigning cases by lot. The Justice who is preassigned to the case is responsible for the preparation of a bench memo. Since the bench memo process is so new, there are no guidelines for their preparation in terms of length or depth of analysis. At this point, this lack of uniformity may be beneficial because it provides an opportunity to see various styles before determining what works and what does not work. The Justice who is preassigned to write the bench memo will later be assigned to write the opinion providing that he or she is in the majority. It is thought that the preparation of the bench memo can positively impact opinion preparation time. At this point in time, the Court is still experimenting with this process.

About ten (10) days prior to oral argument, Clerk's Office personnel will pull relevant materials for the Court's review. This includes copies of the appeal, the briefs, any motions that have not been acted upon, the transcripts and exhibits, and any other relevant materials.

### Post Oral Argument

After oral argument, a straw vote is held. Staff attorneys are invited to attend the straw votes on the 3JX docket cases. This helps them to prepare the orders more effectively. Following the straw vote on the regular docket cases, the opinions are officially assigned to the preassigned Justice who wrote the bench memo if he or she is in the majority.

Assignments are noted on the *Oral Argument List* and the Associate Justices' secretary prepares an *Assignment List*. Two versions of the list are prepared, one listing cases in chronological order by date of filing and one listing cases in numerical order. The chronological order list is then distributed to a limited number of Court personnel.

### Opinion Drafting/Circulation

After assignments have been made, Justices and their law clerks prepare drafts of the opinions. When the Justice determines that the opinion is ready for the next step in the process, it goes to an editing law clerk for further review. The editing law clerks perform the functions that were previously handled by the LC2 process. The editing law clerks follow a checklist to ensure that every citation, fact, and issue is checked. Editing law clerks may also make substantive recommendations. The recommendations go back to the writing chambers for further review.

A new draft is prepared and that draft goes to the Reporter for his/her review. He/She reviews the draft to ensure that it flows logically and is grammatically correct. The draft opinion is then returned to chambers. If there are substantial changes it may be returned to the editing law clerks for another review. Drafts remain in a limited access directory on the Court's network until they are at the final draft stage and ready for case conference.

After the draft opinions are copied and circulated to the Court, the law clerks and the confidential clerk work together to move the final draft opinions to the conference directory on the Court's network. The confidential clerk then prepares the *Case Agenda List*. Included in the list are the case number, case name, name of the authoring Justice, the date the appeal was heard, and the opinion distribution date.

#### Case Agenda/Case Conference

Case conferences are scheduled every other week. The dates for case conferences are generally distributed to Court staff approximately one month ahead of time. The deadline for adding cases to the *Case Agenda List* is two full days before conference.

The Court reviews draft opinions at case conference. Once an opinion is approved for publication, a "red dot" is attached to the draft opinion. This indicates to the confidential clerk that the process for handing down the opinion may begin.

#### Opinion Publication/Dissemination

At the case conference, opinions that are ready for hand down are "red dotted" to indicate that the opinion is the final version. These opinions are given to the Reporter who in turn gives them to the confidential clerk. The confidential clerk inputs any handwritten edits into the computer. He/She then checks the "red dotted" cases against the docket entries, verifies that all motions have been acted upon, adds the header and reformats the document, and spell checks the document. Any further edits are made from this "red dotted" copy.

"Red dotted" copies of opinions and the edited opinions then go to the Reporter for verification. Once verification is completed, clean copies of the opinions and opinion letters informing the parties of the hand-down date are printed. The letters must be prepared at least three days before the hand-down date. They are given to the Reporter who signs and returns the letters and who proofreads the opinions.

If the Reporter makes any edits, new clean copies are printed and 48 copies are made. Bills are prepared for the publishers, who are charged \$2.00 per opinion.

To prepare the opinion for publication by Michie, the opinion is now reformatted to double-spacing. The opinions are printed in this format and given to the Reporter. Running heads and proofreaders' marks are added and given to the Reporter who approves the running heads and returns them to the confidential clerk.

A release date report is prepared listing the release date, the case number, and the case name. This release date report is an internal document.

When the opinion is ready for hand-down, it is moved from the conference directory to the opinion directory on the Court's network. The electronic copy of the opinion is hyperlinked to the electronic docket card on hand-down day. Any versions of the opinion that are still in the conference directory are deleted. The opinion is also renamed, reformatted, and copied into a specific directory so that the AOC's IT staff may post it on the Internet.

### Decisions and Orders List

The *Decisions and Orders List* is a compilation of all the opinions and final orders issued by the Court. It is prepared twice a month and lists the case number, case name, final order date, and the final order. The report's main purpose is to assist in the preparation of certificates of jurisdiction. It can also be used to prepare reports for both the New Hampshire Bar News and the New Hampshire Reports, and to generate court statistics.

### Motions for Rehearing or Reconsideration

After the issuance of an opinion or final order any party may file a motion for rehearing or reconsideration. These motions are due within ten (10) days. Motions for rehearing after an opinion has been announced are reviewed by the Court at Clerk's Agenda. The Court may request that the Senior Staff Attorney prepare a memorandum. Motions for reconsideration of screening decisions are placed on the screening conference agenda. The Court may request the preparation of a memorandum on these motions as well.

### Taxation of Costs

The prevailing party is entitled to reimbursement of certain costs including the entry fee, the cost of reproducing the brief, and the cost of the transcript. A request for taxation of costs must be made within thirty (30) days of the date of the final order or opinion. Opposing counsel then has ten (10) days to file any objection. The Reporter reviews the request and any opposition and then presents the motion to the Clerk. If costs are approved, the taxation of costs is prepared and sent to the trial court with copies to counsel of record.

### Certificate of Order or Mandate

If no motion for rehearing or reconsideration is filed, the Clerk's Office will issue a certificate of order or mandate fifteen (15) days after the date of the opinion or final order. If a motion for rehearing or reconsideration is filed, the certificate will be issued after the Court rules upon the motion. Entries on the electronic docket card are reviewed prior to the issuance of a certificate of order or mandate to ensure that there are no outstanding motions. The electronic docket card is printed out and deleted from the computer and the case is closed.

## **APPENDIX B**

## **Appellate Court Performance Areas and Standards**

### **I. Protecting the Rule of Law**

#### **Standard 1.1 Opportunity for Multi-Judge Review**

Appellate court systems, exercising mandatory or discretionary jurisdiction, should provide a reasonable opportunity for a multi-judge review of decisions made by lower tribunals.

#### **Standard 1.2 Develop, Clarify, and Unify the Law**

Appellate court systems should develop, clarify, and unify the law.

#### **Standard 1.3 Error Correction**

Appellate court systems should provide review sufficient to correct prejudicial errors made by lower tribunals.

#### **Standard 1.4 Extraordinary Functions of Appellate Court Systems**

Appellate court systems should determine expeditiously those petitions for which no other adequate or speedy remedy exists, and should determine original proceedings as directed by law.

### **II. Promoting the Rule of Law**

#### **Standard 2.1 Quality of the Judicial Process**

Appellate court systems should ensure adequate consideration of each case and decisions based on legally relevant factors, thereby affording every litigant the full benefit of the judicial process.

#### **Standard 2.2 Clarity of Decisions**

All appellate court decisions should be clear, and written opinions should address the dispositive issues, state the holding, and articulate the reasons for the decision in each case.

#### **Standard 2.3 Designation of Precedential Authority**

Appellate court systems should designate as authority, which may be cited, those written decisions that develop, clarify, or unify the law.

#### **Standard 2.4 Timeliness**

Appellate court systems should resolve cases expeditiously.

### **III. Preserving the Public Trust**

#### **Standard 3.1 Accessibility**

Appellate court systems should be procedurally, economically, and physically accessible to the public and to attorneys.

#### **Standard 3.2 Public Access to Decisions**

Appellate court systems should facilitate access to their decisions.

#### **Standard 3.3 Public Education and Information**

Appellate court systems should inform the public of their operations and activities.

#### **Standard 3.4 Regulation of the Bench and Bar**

Appellate court systems should ensure the highest professional conduct of both the bench and the bar.

### **IV. Using Public Resources Efficiently**

#### **Standard 4.1 Resources**

Appellate court systems should seek and must obtain sufficient resources from the legislative and executive branches to fulfill their responsibilities.

#### **Standard 4.2 Case Management, Efficiency, and Productivity**

Appellate court systems should manage their caseload effectively and use available resources efficiently and productively.

#### **Standard 4.3 Assistance to Trial Courts**

Appellate court systems should develop methods for improving aspects of trial court performance that affect the appellate judicial process.